

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

Date: July 24, 1997

Case No.: 95 INA 462

In the Matter of:

JERRY'S RESTAURANTS,
Employer,

on behalf of

ALONSO IBARRA CORRAL,
Alien

Appearance: James Kelly, Esq., Incline Village, NV.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that Jerry's Restaurants (Employer), filed on behalf of Alonso Ibarra Corral, (Alien), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On November 5, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of "Kitchen Manager/Cook." AF 14. The job requirement for the position was two years of experience. The job description was the following:

Will supervise and schedule all kitchen personnel including cooks, dishwashers, pantry workers and others. Will fill in as needed in all positions primarily chef/cook staff. Will order and inventory all food items and be responsible for purchase order and inventory control. Responsible for all inspections for cleanliness and temp. control of food items and storage areas. Requires 2 yrs. experience in chef/cook area.

AF 14.

Notice of Findings On August 23, 1994, the CO advised the Employer that certification would be denied in a Notice of Findings (NOF). The CO explained that the Employer had rejected three U.S. workers, Booker, Bowyer, and Bracken for other than valid, job-related reasons. While Mr. Jarl, a fourth U.S. applicant, was hired by Employer for another position, this action was sufficient to establish the existence of U. S. workers who were able, willing, qualified and available to perform the work, said the CO.

The Employer was given the opportunity to respond by filing evidence of the specific, lawful, job-related reasons for not hiring each of the U. S. workers referred for this position.

Rebuttal. The Employer's rebuttal to the NOF consisted of a letter by its attorney, which was dated September 11, 1994, but no new evidence. AF 07-09. The Employer argued that the three U. S. applicants were rejected for the following reasons:

(1) U. S. worker Booker was rejected because he had no experience in single dish preparation and had never cooked on line, and it was the applicant's position that he did not have the training or experience of single meal preparation.

(2) U. S. worker Bowyer was interviewed by telephone and was asked to supply additional information, which he never did. His resume and personal interview indicated that he had no experience in management or supervisory capacities, and his references, when

contacted, indicated that he would not be rehired. "While a personal interview was not conducted it became apparent" that Bowyer was under the influence of "some type of substance."

(3) U. S. worker Bracken's past positions were in the preparation of special diets at hospitals. She did not cook foods, but simply "prepared" them for cooking.

(4) The Employer contended with respect to U. S. applicant Jarl that he was hired in the management training program because of his training and experience.

Final Determination. Finding that the Employer's rebuttal was not persuasive, the CO denied certification in a Final Determination issued October 25, 1994. AF 05-06. The CO noted that the requirement of experience in single dish preparation had not been stated in the ETA 750A. The CO observed that while Mr. Bower's references were mentioned in general terms, Employer's attorney gave no details concerning the contacts with those references. Also, the statement that this U. S. worker had no supervisory experience was contrary to his resume. With respect to Mr. Bracken, the CO found that the Employer failed to explain how it distinguished between food preparation and cooking.

Appeal. The Employer filed a motion for reconsideration was filed November 22, 1994, which the CO rejected on grounds that motions for reconsideration will only be entertained as to issues that could not have been addressed in the rebuttal. AF 01, 02-04.

DISCUSSION

The regulations provide that, if U.S. workers have applied for the job opportunity, the employer must establish that they were rejected solely for lawful job-related reasons. 20 CFR § 656.21(b)(6). Similarly, 20 CFR § 656.21(j)(1)(iv) requires that the employer provide to the state referring agency acting in behalf of the Department of Labor a written report of all post-application recruitment. The Employer is required to explain in that report "with specificity" its lawful, job-related reasons for not hiring each U. S. worker that was interviewed. It is the general rule that an applicant is considered qualified for a job who meets the minimum requirements that the employer specified for that job in the labor certification application. **United Parcel Service**, 90 INA 090(Mar. 28, 1991).

Bowyer. Employer claims that U. S. applicant Bowyer had poor references and no supervisory experience, and that he appeared to be under the influence of some type of substance. The Employer did not document its allegation that his references were poor. Contrary to the Employer's unsupported assertion, Mr. Bowyer's resume lists years of experience as a cook, during some of which

he worked in a supervisory position. The Employer's assertion that Mr. Bowyer had a problem with substance abuse, which was made on the basis of a telephone call, also is totally unsupported by evidence. Moreover, in spite of his qualifying resume, Mr. Bowyer was never interviewed in person. It follows that the second hand hearsay asserted by the Employer's attorney as factual evidence is entirely lacking in credibility for this reason. In summary, none of the Employer's reasons for rejecting this applicant are documented with corroborating evidence of any kind and the review of this aspect of the record may turn on the holding that certification may properly be denied where none of an employer's proffered reasons for rejecting a qualified U.S. worker were documented. **Gemini Worldwide Cargo Corp.**, 93 INA 230 (Jul. 6, 1994).

Booker. Although his resume showed eight years of experience in such areas of Food Service such as preparation, supply, supervision and training, Employer rejected Mr. Booker because, it said, his experience was in large bulk order food service and not in single dish preparation,. Employer alleges, moreover, that Mr. Booker said he did not have the training or experience of single meal preparation. In the questionnaire completed by Mr. Booker, however, he indicated that the Employer never interviewed him in person because the Employer said that he did not possess management skills. AF 21. In fact, Mr. Booker indicates, his experience as a line cook included eight years in preparing and serving buffet, catering, banquet, and various social events, as well as having been in charge of the short order cook line for three years. While Employer did not regard him as qualified for its job, we find that this U. S. applicant's qualifications were sufficient to warrant the Employer's a further investigation by way of a personal job interview.

Summary. An employer's nonspecific, general assertions that an applicant lacks qualifications are not sufficient, especially where the employer's allegations are directly contradicted by the worker's statement of qualifications and experience. **Arthur Domrose**, 91 INA 386(Dec. 11, 1992). As Employer's requirement of experience in single dish preparation was not listed in its ETA 750A or its job advertisement, the CO correctly noted that the Employer's rejection of Mr. Booker was unlawful, since it is well-established that an employer's rejection is unlawful where the U. S. worker has satisfied the minimum requirements stated by the employer in the ETA 750A and in recruiting advertisement for the job. **American Cafe**, 90 INA 026(Jan. 24, 1991).

Where, as in the applications by Mr. Bowyer and Mr. Booker, a job applicant's resume includes a broad range of experience in various aspects of the main requirements for the position, an employer has a heavy burden of proof when it contends that one collateral aspect of the job cannot be quickly learned in the on-the-job training of a worker with the level of experience of

these applicants. **The Weck Corporation d/b/a/ Gracious Home**, 93 INA 035(Mar. 8, 1995). For this reason it follows that resumes of both Mr. Booker and Mr. Bowyer reveal that they each warranted further investigation by Employer under all of the circumstances of this case.

Moreover, it has been held to be an improper diversion where an employer concludes that a U. S. applicant is overqualified and offers that worker a higher paid position than the position being advertised. **Aloha Airlines**, 91 INA 181 (June 1, 1992). For this reason the Employer's hiring of Mr. Jarl for a position earning a higher rate of pay was properly held to be an improper diversion in this case.

After a carefully reviewing the U. S. applicants' resumes, as well as the position at issue, we agree with the CO's finding that these U. S. workers were rejected for reasons that were neither lawful nor job-related. As the CO properly denied certification, any remaining issues need not be addressed. Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

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ALONSO IBARRA CORRAL, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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Thank you,

Judge Neusner

Date: July 1, 1997.